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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052950
Party	Defendant King Par, LLC
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THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

KING PAR, LLC,	)	
	)	
PETITIONER,	)	
	)	CANCELLATION NO. 92052163
v	)	
	)	
SPORTS SOURCE, INC.,	)	
	)	
RESPONDENT.	)	

AND

JOHN S. FRANKLIN,	)	
	)	
PETITIONER,	)	
	)	CANCELLATION NO. 92052950
v	)	
	)	
KING PAR, LLC	)	
	)	
RESPONDENT.	)	

PLAINTIFF'S REPLY TRIAL BRIEF

The above-named Plaintiff, for its reply to Defendant/Counterclaim-Plaintiff's trial brief, states as follows:

I. DEFENDANT'S EVIDENCE IS NOT APPROPRIATELY OF RECORD

In its trial brief, Defendant offers in evidence several documentary exhibits, and a CD of a voice message left on an answering machine.

Plaintiff submits that none of the evidence so submitted is admissible.

First, it is worthy of note that the Defendant did not undertake any trial testimony. Defendant's representatives were not present at Plaintiff's trial depositions of Mark Schlosser or Ryan Coffell, although Defendant was represented at Defendant's own trial deposition.

Defendant did not seek to offer into evidence any documents at any time. In its trial brief, however, Defendant does submit a number of proposed exhibits, which Plaintiff contends are not entitled to consideration.

Exhibits and other evidentiary materials attached to a party's brief in a case can be given no consideration unless they were properly made of record during the time of taking testimony. *37 C.F.R. § 2.122(c).* Further, factual statements made in a party's brief in the case cannot be given consideration unless they are supported by evidence properly introduced. *Electronic Data Systems Corp. v EDSA Micro Corp.*, 23 USPQ 2d 1460 (TTAB 1992) On this basis, with the exception of documents identified as exhibits in the Plaintiff's trial testimony (King Par's 2010 catalog), none of the exhibits proposed by Defendant are properly before the Board and should be disregarded.

II. LIKELIHOOD OF CONFUSION

The Plaintiff does not contest the fact that it has not offered evidence of actual confusion, the reason that the Plaintiff has not investigated this issue. The costs associated with conducting an investigation and consumer survey associated with actual confusion is beyond the resources of the Plaintiff.

Plaintiff is justified in relying, however, on an admission against interest made by counsel for the Defendant, during the Franklin deposition, wherein the following exchange took place:

> "Mr. MacFarlane: For the record, I am referring to a letter provided to me by the witness in response to my request for production of documents. And it was submitted, I believe, by Mr. Franklin on November 5, 2010. It purports to be a letter dated May 31, 2006, and it begins…its directed to Mr. Finklestein…at Sports Source, Inc. and it says, 'while 'DIAMOND' by itself as used for golf equipment would present a likelihood of confusion with Diamond Golf, this did not turn up in our search for some reason we cannot explain."
>
> "Q Do you remember asking or having someone in your organization ask that some research be done into the availability of the trademark "DIAMOND GOLF" for use by Sports Source?
>
> A I didn't remember at the time, but…but looking at these documents refresh my memory…" (Franklin Dep., pg. 37-38)

The fact that Defendant's attorney believed that a likelihood of confusion exists in the marketplace between the Plaintiff's registered mark "DIAMOND" and the Defendant's mark "DIAMOND GOLF" is powerful evidence in support of a finding of the likelihood of confusion.

III. ABANDONMENT

Plaintiff contends that a telephone call made by a person identified only as "Sylvia" from King Par on or about August 30, 2010, constitutes evidence of Plaintiff's intention to abandon the "DIAMOND" trademark.

As explained in the introduction to this reply brief, this voice recording is not properly in evidence. Assuming, however, *arguendo* that the voice recording was to be considered, its content is unreliable and insufficient to establish abandonment. First, nothing in evidence identifies who "Sylvia" is. Defendant did not seek to conduct any discovery regarding the identity, position or qualification of the person identified as "Sylvia" on the voice recording. Secondly, the recording itself recites that Sylvia is reporting information that she obtained from "Brad", another individual whose identity, position and responsibilities are unknown. Further, the statement contains only the assertion that King Par did not have, at the time of the call, any

golf clubs bearing the name "DIAMOND", and contains a statement that King Par did not actually purchase any golf clubs from some unspecified vendor. Finally, the phone conversation concludes with a statement that the speaker concluded "we do not have any", presumably meaning golf clubs bearing the "DIAMOND" mark.

Defendant somehow concludes from this statement that this is an admission that King Par had not used the mark "DIAMOND" on golf clubs for at least six years. Of course, this telephone message says nothing of the sort. More importantly, the testimony is inconsistent with the testimony of Ryan Coffell, whose trial testimony details exactly how and when King Par was using the "DIAMOND" mark.

IV. CONCLUSION

Since the Defendant's trial brief includes no admissible evidence, and since its arguments on likelihood of confusion and abandonment are without merit, Plaintiff respectfully submits that its request for cancellation should be granted, and Defendant and Counter-Plaintiff's request for cancellation should be denied.

Respectfully submitted,

/Marshall G. MacFarlane/

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DATED: December 9, 2011

CERTIFICATE OF MAILING

I hereby certify that this correspondence: PLAINTIFF'S REPLY TRIAL BRIEF, is being filed with the TTAB electronically, on December 9, 2011.

/Marshall G. MacFarlane
Marshall G. MacFarlane

CERTIFICATE OF SERVICE

I hereby certify that this correspondence: : PLAINTIFF'S REPLY TRIAL BRIEF, is being deposited with the United States Postal Service, 1st Class Mail, postage prepaid, in an envelope addressed to Douglas M. Kautzky, 3868 Carson Street, Suite 105, Torrance, California 90503, on December 9, 2011.

/Marshall G. MacFarlane
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